

POLICY BRIEF

What Happens to Abortion in New York If Brett Kavanaugh Is Confirmed?

September 12, 2018

Andy Ayers

Rockefeller
Institute of Government

ALBANY LAW SCHOOL
**GOVERNMENT
LAW CENTER**



CENTER for
LAW & POLICY
SOLUTIONS



ABOUT THE AUTHOR

Andy Ayers is director of the Government Law Center and an assistant professor of law at Albany Law School. He is also on the Center for Law & Policy Solutions' advisory committee.



Introduction

Public debate over the nomination of Judge Brett Kavanaugh to replace Justice Anthony Kennedy on the US Supreme Court has focused on the possibility that Kavanaugh would change the direction of the court, particularly in the area of abortion rights. If the Supreme Court walks back federal constitutional protections, state constitutions — which can protect specific rights even when the federal constitution does not — become increasingly relevant.

Of all abortions in the United States, 12.9 percent take place in New York,¹ so the status of abortion rights in New York is a matter of undeniable significance to people on both sides of the abortion-rights debate. This Policy Brief explains the laws that will govern the future of abortion in New York after Justice Kennedy's retirement, drawing on insights from a panel discussion at the Rockefeller Institute of Government in July 2018.* If Brett Kavanaugh is confirmed as Justice Kennedy's successor, will the Supreme Court limit abortion rights? And, if so, what will happen in New York?

Judge Kavanaugh's Background

Many commentators find in Judge Kavanaugh's record sufficient evidence to believe that he would take a dramatically different approach to abortion rights than his predecessor. After clerking for Justice Kennedy, Kavanaugh went on to be involved in so many of the high-profile partisan disputes of the late 1990s and early 2000s that he is sometimes referred to as "the Forrest Gump of Republican politics."²

If the Supreme Court walks back federal constitutional protections, state constitutions — which can protect specific rights even when the federal constitution does not — become increasingly relevant.

* Video of the panel discussion, "State Constitutions in the Era of a Shifting Supreme Court," is available at <http://rockinst.org/blog/state-constitutions-in-the-era-of-a-shifting-supreme-court/>.



First, Kavanaugh went to work for Ken Starr in the Office of Independent Counsel, where he was a principal author of the Starr Report on President Clinton's relationship with Monica Lewinsky. He also investigated the suicide of Vince Foster.³

Kavanaugh then went into private practice, where he represented the relatives of Elián González, the six-year-old survivor of the boat carrying the boy's mother and other refugees that sank on its way from Cuba; the relatives Kavanaugh represented sought to prevent the boy's return to his father in Cuba.⁴

In 2000, Kavanaugh traveled to Florida to work on the *Bush v. Gore* recount.⁵ He was then hired as an associate in the Office of the White House Counsel, and in 2003 he became an assistant to the president and White House staff secretary.⁶ At the White House, Kavanaugh was involved in the case of Terri Schiavo, the Florida woman who suffered from brain damage and became the subject of a dispute between her husband, who wanted to remove her feeding tube, and her family, who wanted to keep her alive.⁷ When Congress passed emergency legislation to keep Schiavo alive, it was Kavanaugh who handed President Bush the bill for signature.⁸

During Kavanaugh's time in the White House, he oversaw multiple judicial nominations, including high-profile nominees like Miguel Estrada and Priscilla Owen.⁹ Partisan fighting over judicial nominations was particularly bitter in the early 2000s. And the prevailing slogan in conservative circles was "No More Souters" — a reference to Justice David Souter, who was nominated by a Republican president but became one of the most reliably liberal votes on the court.¹⁰

Kavanaugh was confirmed to the DC Circuit Court in 2006, and he has been firmly conservative in various areas of law, such as the power of the regulatory state.¹¹

Judge Kavanaugh's Record on Abortion

Would Judge Kavanaugh change the direction of the court on abortion? Justice Anthony Kennedy, before his resignation, was not a supporter of abortion rights in every case that came before him; for example, he wrote an opinion upholding a ban on a procedure that antiabortion activists refer to as “partial-birth abortion.”¹² But Kennedy was long seen as the decisive fifth vote on the current court to protect reproductive rights.

In 1992, Kennedy was one of three Republican-nominated justices who affirmed the basic principle of *Roe* and created the still-governing standard for reproductive rights, which bars states from placing an “undue burden” on those rights.¹³ In 2016, he affirmed that principle and found that the state of Texas had placed an undue burden on abortion rights by requiring abortion providers to have admitting privileges at a local hospital, and by requiring clinics to meet the same building, safety, and staffing standards as ambulatory surgical centers.¹⁴

There are several reasons to think that Kavanaugh will provide a decisive vote to limit abortion rights, if not to end them. President Trump announced as a candidate that overturning *Roe* “will happen automatically in my opinion because I’m putting pro-life justices on the Court.”¹⁵ And one of Kavanaugh’s former law clerks recently wrote, “On the vital issues of protecting religious liberty and enforcing restrictions on abortion, no court-of-appeals judge in the nation has a stronger, more consistent record than Judge Brett Kavanaugh.”¹⁶

Three pieces of evidence have figured prominently in the examination of Kavanaugh’s record on abortion: a 2003 email; a 2017 speech to the American Enterprise Institute; and his 2017 judicial opinion in a case called *Garza v. Hargan*.¹⁷

The 2003 Email Conversation

In 2003, while Kavanaugh was working on judicial nominations at the White House, he participated in an email conversation in which Republican staff at the Senate, and others, discussed drafting op-eds in support of judicial nominee Priscilla Owen.¹⁸ The suggestion was to find “high-profile, pro-choice women” who would support Owen. (In the transcript of this conversation, which was published during Kavanaugh’s Supreme Court confirmation hearings, the identity of the author of this suggestion is redacted.) A draft was circulated, which contained this language:

The invented charge against Owen is similarly groundless. Some Democrats claim that confirming Owen would somehow threaten a woman’s right to choose an abortion. As a fervently pro-choice woman who has studied the law and Owen’s nine-year record on the Texas Supreme Court, I find the claim patently absurd.

There are several reasons to think that Kavanaugh will provide a decisive vote to limit abortion rights, if not to end them.



First of all, it is widely understood accepted [sic] by legal scholars across the board that *Roe v. Wade* and its progeny [sic] are the settled law of the land. Moreover, federal courts of appeals, which are inferior to the Supreme Court, have no power to overturn Supreme Court precedents like *Roe v. Wade*.

The author of the draft sought comment; Kavanaugh wrote back:

I am not sure that all legal scholars refer to *Roe* as the settled law of the land at the Supreme Court level since [the] Court can always overrule its precedent, and three current Justices on the Court would do so. The point there is in the inferior court point.

Advocates of reproductive rights have pointed to this language as evidence that Kavanaugh views *Roe* as less than “settled.”¹⁹ At his 2018 confirmation hearing, Kavanaugh said that his email was referring to the views of legal scholars, not his own views.²⁰

The context of the email message is significant. The draft op-ed was designed to suggest that a pro-choice woman supported Owen; thus, the stronger the views of the “author” about *Roe*’s solidity, the more convincing her endorsement of the nominee would appear. But Kavanaugh was reluctant to have this pro-choice speaker endorse the idea of a scholarly consensus that *Roe* is settled. To be sure, it is possible that Kavanaugh was simply insisting on what he saw as accuracy — law professors rarely reach an absolute consensus on anything, and he was correct that three justices were willing to overrule *Roe*. But it seems at least equally likely that he found the idea of a consensus on *Roe*’s canonical status hard to stomach, even if the person voicing that idea was a pro-choice woman endorsing a nominee Kavanaugh backed.

The Speech to the American Enterprise Institute

In 2017, Kavanaugh gave a speech honoring the late Chief Justice William Rehnquist, in which he said that “In case after case after case during law school,” he noticed that he “would constantly make notes to myself: *Agree with Rehnquist.*”²¹ Kavanaugh described Rehnquist’s “role in turning the Supreme Court away from its 1960s Warren Court approach, where the Court in some cases had seemed to be simply enshrining

its policy views into the Constitution, or so the critics charged.”²² It is clear that Kavanaugh is among those critics when he writes, “For a total of 33 years, William Rehnquist righted the ship of constitutional jurisprudence.”²³

In this speech paying tribute to Rehnquist, Kavanaugh discusses Rehnquist’s dissent in *Roe v. Wade*. “Justice Rehnquist was not successful in convincing a majority of the justices in the context of abortion either in *Roe* itself or in the later cases such as *Casey*, in the latter case perhaps because of *stare decisis*,” Kavanaugh said. “But he was successful in stemming the general tide of freewheeling judicial creation of unenumerated rights that were not rooted in the nation’s history and tradition.”²⁴ Kavanaugh contrasted cases in other areas of law, like assisted suicide, where Rehnquist’s view prevailed, “limiting the Court’s role in the realm of social policy and helping to ensure that the Court operates more as a court of law and less as an institution of social policy.”²⁵

To be sure, Kavanaugh never says in so many words that he believes *Roe* to have been wrongly decided. By the time the speech was given, however, Kavanaugh had been repeatedly mentioned as a possible Supreme Court nominee.²⁶ And it would be unusual for a potential Supreme Court nominee to opine directly and explicitly on *Roe*’s validity.

Garza v. Hargan

The other key piece of evidence of Kavanaugh’s views on abortion also dates from 2017, when Kavanaugh published an opinion in the case of *Garza v. Hargan*, a case involving an undocumented seventeen-year-old in federal immigration custody who sought to terminate her pregnancy.²⁷ A Texas judge granted her permission to bypass the state’s parental-consent requirement, which made her eligible for the abortion under state law. The federal government, while not disputing her right to an abortion, insisted that she find a sponsor — that is, an adult with whom she could live — before obtaining the abortion.²⁸

A majority of the court found that requiring the minor to find a sponsor would constitute an “undue burden” on her rights, and ordered the government to permit her to obtain the abortion. But Judge Kavanaugh argued that this view created “a new right for unlawful immigrant minors in U.S. Government detention to obtain immediate abortion on demand, thereby barring any Government efforts to expeditiously transfer the minors to their immigration sponsors before they make that momentous life decision.”²⁹

To be sure, Kavanaugh did not adopt the position of one of his colleagues, Judge Henderson, who would have held that the right to abortion does not extend to undocumented people who have not legally achieved “entry” into the United States.³⁰ But for Kavanaugh to opine on this question would have made no difference in the result, with potentially significant political costs should he be nominated to the Supreme Court.

During his confirmation hearings, Kavanaugh was asked about his views on abortion rights repeatedly, but — as is customary in recent confirmation hearings — did not directly address whether *Roe* and *Casey* were correctly decided or whether they should be overturned. Instead, he said that *Roe* was “settled as a precedent of the Supreme Court, entitled the respect [due] under principles [of] ‘stare decisis.’”³¹ This statement appears to carefully avoid opining on *how much* respect is due under principles of *stare decisis*, and whether that respect would be sufficient reason to avoid upholding it. And it says nothing about how much incremental restriction of abortion rights is permissible before *Casey*’s “undue burden” standard is met.

In short, there is good reason to believe that Kavanaugh would be willing to reduce protections for abortion under the federal constitution, and little to suggest otherwise. His record on the DC Circuit Court gives no indication of his views on *stare decisis*, because the DC Circuit is bound to follow Supreme Court precedent in a way the US Supreme Court is not. But the “undue burden” standard allows for a substantial rollback of abortion rights without an explicit disavowal of *Roe* or *Casey*, and Kavanaugh’s record makes a rollback of this kind appear highly likely.

**For a useful guide to the *Garza v. Hargan* case,
see this short piece in the
Harvard Law Review:**

[https://harvardlawreview.org/wp-content/
uploads/2018/04/1812-1819_Online.pdf](https://harvardlawreview.org/wp-content/uploads/2018/04/1812-1819_Online.pdf)

Abortion under New York Law

New York’s Constitution

New York State’s Constitution does not mention abortion explicitly. It does, however, contain a due process clause: “No person shall be deprived of life, liberty or property without due process of law.”³² The New York Court of Appeals has stated that “the fundamental right of reproductive choice, inherent in the due process liberty right guaranteed by our State Constitution, is at least as extensive as the Federal constitutional right.”³³ In doing so, it specifically cited *Roe* and *Casey*, meaning that the state constitution protects abortion rights to at least the same extent those decisions do.³⁴

So if the New York Court of Appeals says “the New York Constitution is at least as protective as *Roe* and *Casey*,” and *Roe* and *Casey* are later rolled back, does the New York Constitution roll back too? Almost certainly not. The state court has never said that the New York Constitution varies with the US Constitution. When state courts



reference the federal Constitution in discussions of their state constitutions, they are simply using the federal Constitution as shorthand for the amount of protection the state constitution provides.

Nonetheless, the lack of explicit mention of abortion rights in the state constitution leaves some room for interpretation; thus, in 2017, Governor Andrew Cuomo proposed an amendment to the New York Constitution that would have inserted explicit protection for abortion rights into the state constitution.³⁵ Amending the state constitution would require that the proposal be passed by two successive state legislatures and a popular referendum, and the proposal did not pass.³⁶

New York Statutes

The New York statute that governs abortion rights was signed by Governor Nelson Rockefeller in 1970, three years before *Roe v. Wade*. It was the second state (after Hawaii) to broadly legalize the procedure, and the first to allow abortions for out-of-state residents.³⁷ Before 1970, abortion was a crime — a homicide — unless the life of the mother was in jeopardy.³⁸

Under the 1970 law, abortion is still a crime in New York, but there are exceptions that make it “justifiable” (not punishable) in certain circumstances. Specifically, an abortion is “justifiable” if it is performed (1) within twenty-four weeks of conception or (2) to save a woman’s life.³⁹

The law had an immediate effect in New York and nationally; because abortion was still illegal in most other

**New York State's
Constitution does not
mention abortion explicitly.
It does, however, contain
a due process clause: "No
person shall be deprived
of life, liberty or property
without due process of
law." The New York Court
of Appeals has stated that
"the fundamental right
of reproductive choice,
inherent in the due process
liberty right guaranteed by
our State Constitution, is
at least as extensive as the
Federal constitutional right."**



states, 60 percent of the women who had abortions in New York during the first year after the law's enactment were from other states.⁴⁰ Nonetheless, as the next section explains, the terms of the law have been the subject of continuous debate up to the present day, especially its failure — discussed below — to create an exception for late-term abortions that are intended to protect the mother's health (rather than her life).

Massachusetts recently amended its laws to protect abortion in anticipation of Justice Kennedy's retirement.⁴¹ Other "blue" states are considering similar measures.⁴² But similar efforts to change New York's statutes have not, so far, been successful.⁴³ Governor Eliot Spitzer proposed legislation to liberalize the state's abortion laws in 2007, but it didn't pass.⁴⁴ Other bills, including the "Reproductive Health Act" introduced during the 2017-18 session, were introduced but have not passed; their key provisions will be discussed below.⁴⁵

The following sections discuss issues that are likely to arise in the future about the availability of abortion in New York State, and identifies places where Judge Kavanaugh's confirmation might have an impact.

Questions about the Future of Abortion in New York

Treating Abortion as a Criminal Issue

The Reproductive Health Act would (among other changes) remove the statutory provisions governing abortion from New York's Penal Law (i.e., its criminal code) and put them in its Health Law.⁴⁶ In doing so, it would make clear that any abortion provider who falls astray of its provisions — e.g., by providing a late-term abortion without sufficient justification — faces civil liability, not criminal punishment.

Nothing in federal or state constitutional law has implied a requirement that abortion be treated as a civil issue; to the extent that states are allowed to restrict abortion, they appear to be allowed to do so using their criminal laws. Thus, Judge Kavanaugh's confirmation would have little effect on this question.

Lack of an Exception for the Mother's Health

In at least one respect, New York's present statute conflicts with *Roe* and *Casey*: it creates no exception for abortions after twenty-four weeks that are necessary to protect a woman's health — only to protect her life.

For example, if pregnancy may cause a woman to suffer heart or kidney problems, or preeclampsia, without endangering her life. In such cases, abortion would protect her health, but not her life. Pro-life advocates often argue that abortion is never medically necessary; pro-choice advocates argue that if doctors wait until a condition is life-threatening before performing an abortion, it may be too late.

Roe and *Casey* guarantee a right to abortions that protect health.⁴⁷ Thus, in 2016 the New York attorney general opined that New York's statute, despite its failure to provide an exception for abortions that protect health, must be interpreted to contain an implicit health exception.⁴⁸

If *Roe* and *Casey* were overturned, it would be necessary for state courts to decide whether the New York Constitution guarantees a right to abortions that protect women's health. As noted above, the Court of Appeals has already stated that the state's constitution protects abortion rights to the same extent as *Roe* and *Casey*, which would imply a health exception.⁴⁹ Although the court has not yet directly ruled on the question, the answer seems a foregone conclusion unless there is a dramatic change in the makeup of the state Court of Appeals.

Lack of an Exception for Fetal Nonviability

Another inconsistency between New York's statute and federal constitutional law is that *Casey* bars states from placing an undue burden on women's ability to obtain an abortion in cases of nonviability.⁵⁰ But New York's statutes do not allow abortions after twenty-four weeks in cases where the fetus is nonviable. Thus, given the Court of Appeal's statement that the New York Constitution protects abortion rights to the same extent as *Casey*, it appears that New York's statute violates both constitutions. Thus, the state law must be read to implicitly allow late-term abortions in cases of fetal nonviability (or simply treated as unconstitutional and ignored in this respect).

The continuing existence of the statute criminalizing late-term abortions may have a chilling effect in spite of the constitutional requirement that it be ignored. Advocates have pointed to cases in which women have traveled to other states to obtain abortions for fetuses that would

If *Roe* and *Casey* were overturned, it would be necessary for state courts to decide whether the New York Constitution guarantees a right to abortions that protect women's health.

But New York's statutes do not allow abortions after twenty-four weeks in cases where the fetus is nonviable. Thus, given the Court of Appeal's statement that the New York Constitution protects abortion rights to the same extent as *Casey*, it appears that New York's statute violates both constitutions.



be unable to survive after birth (for example, a fetus that was unable to breathe independently), apparently because healthcare providers or insurers were reluctant to violate a statute that (despite its unconstitutionality) remains on the books.⁵¹ The Reproductive Health Act would explicitly allow abortions in cases of nonviability.

Limiting Abortions to the First Twenty-Four Weeks

Under *Roe* and *Casey*, the federal Constitution guarantees a right to abortion until the fetus is viable; viability is commonly understood to occur at around twenty-four weeks, which means that federal law and New York law roughly agree on the time before which a right to abortion exists. And, as noted above, the Court of Appeals has stated that the New York Constitution protects abortion rights to the same extent as *Roe* and *Casey*.

Pro-life state legislators have introduced bills that would ban abortion after twenty weeks, but these bills have not passed.⁵³ They are unconstitutional under current law; if they passed, and were challenged in court, they would provide an opportunity for supporters to test the reconstituted Supreme Court's willingness to revisit *Roe* and *Casey*.

Abortions by Physician Assistants and Nurse Practitioners

The Reproductive Health Act would also allow new kinds of healthcare providers to perform abortions. Currently, abortion can only be performed by licensed physicians, but the Act would allow physician assistants and nurse practitioners to perform abortions."⁵⁴

In 1997, the United States Supreme Court held that it was constitutional for the state of Montana to require that only licensed physicians (not physician assistants) perform abortions.⁵⁵ But the Montana Supreme Court then held that the *state* constitution guaranteed a woman's right to obtain an abortion from a healthcare provider of her choice.⁵⁶

Assuming Judge Kavanaugh does not turn out to be a surprise advocate for the increased availability of abortion, he will not wish to revisit the Supreme Court's restrictive position on abortions by nonphysicians. Thus, his confirmation is unlikely to have an effect on this question — unless it is by galvanizing popular sentiment behind the Reproductive Health Act.

Incremental Restrictions

Many of the recent federal cases dealing with abortion do not directly involve the continuing validity of *Roe* and *Casey*. Instead, they involve what abortion-rights advocates refer to as "Targeted Restrictions of Abortion Providers," or "TRAP" laws. These laws make abortion more inconvenient, more expensive, or more difficult to access, without affirmatively prohibiting it.

For example, the most recent Supreme Court case on abortion, *Whole Woman's Health v. Hellerstedt*, involved a Texas law that (1) required doctors who perform abortions to have admitting privileges at a local hospital, and (2) required abortion clinics to meet the strict standards for ambulatory surgical centers.⁵⁷ Although the law did not directly prohibit any abortions as such, half the abortion clinics in Texas immediately closed. The Supreme Court held that this law constituted an "undue burden" on access to abortion, and barred Texas from enforcing it. Nonetheless, similar laws in about half of the states have significantly reduced the number of abortion providers nationwide.⁵⁸ At least seven states now have only one abortion provider.⁵⁹

Even if Justice Kavanaugh does not vote to overturn *Roe* and *Casey*, it seems very likely he would take a different view of what constitutes an undue burden, and join the three justices who would have upheld the restrictions at issue in *Whole Woman's Health*. But New York State has no history of passing incremental restrictions of this kind.

"Partial-Birth" Abortion

The Supreme Court in 2007 upheld the constitutionality of a federal statute called the Partial-Birth Abortion Ban Act,⁶⁰ which prohibited a specific abortion procedure, referred to by pro-life advocates as "partial-birth abortion." Although the Supreme Court had previously held the term "partial-birth abortion" to be unconstitutionally vague,⁶¹ it held in *Gonzales v. Carhart* that the term referred to a medical procedure known as "intact dilation and extraction," and that prohibiting that procedure was consistent with *Roe* and *Casey*. Thus, the federal law still applies, and the procedure remains illegal in all states.

Many of the recent federal cases dealing with abortion do not directly involve the continuing validity of *Roe* and *Casey*. Instead, they involve what abortion-rights advocates refer to as "Targeted Restrictions of Abortion Providers," or "TRAP" laws. These laws make abortion more inconvenient, more expensive, or more difficult to access, without affirmatively prohibiting it.

Because Justice Kennedy was the author of the Supreme Court's decision in *Gonzales v. Carhart*, Judge Kavanaugh's confirmation is virtually certain to result in no change to the legal landscape relevant to the legality of intact dilation and extraction.

Public Funding

Another frequently debated issue in New York and nationally is public funding for abortions. The Supreme Court has held that the federal constitution does not require states to pay for abortions, even if they are medically necessary.⁶² The New York Court of Appeals reached the same conclusion about the state constitution in 1994.⁶³ It left open the possibility that New York's Constitution, like several other states' constitutions, might require public funding for medically necessary abortions for *indigent* women.⁶⁴ But, again, Judge Kavanaugh's confirmation appears unlikely to precipitate any change in the state legal landscape on this question.

Insurance Coverage of Abortion

New York regulations presently require that health insurers "[p]rovide coverage for abortion services that are medically necessary without co-pays, coinsurance, or deductibles (unless the plan is a high deductible plan)."⁶⁵ New York is one of only three states to have passed such a broad requirement that insurance plans cover abortion.⁶⁶

Neither the state nor the federal Constitution has ever been construed to require that private insurers cover abortion. And because this requirement is codified in a regulation, rather than a statute, it can be withdrawn by any future governor. Thus, Kavanaugh's confirmation would not affect it.

Conclusion

Justice Kennedy's retirement makes it likely that there will be significant changes in Supreme Court law governing the right to abortion. But, as the discussion above explains, it is unlikely that any changes in federal law will directly affect the future of abortion in New York State, because the New York Constitution and statutes already protect abortion rights in many of the same ways as the current federal constitutional precedents. Abortion law in New York State, however, is in flux, with many issues that remain open and many proposed changes in bills that are the subject of active debate. Indeed, Judge Kavanaugh's confirmation may create political momentum to further protect abortion rights in New York State. Either way, if federal constitutional protections for abortion rights are rolled back, New York State's Constitution and laws will become the principal protection for abortion rights in New York .

Endnotes

- 1 "State Facts About Abortion: New York," Guttmacher Institute, accessed May 2018, <https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-new-york#7a>, citing Rachel K. Jones and Jenna Jerman, "Abortion Incidence and Service Availability in the United States," *Perspectives on Sexual and Reproductive Health* 49, 1 (2017), https://www.guttmacher.org/sites/default/files/article_files/abortion-incidence-us.pdf.
- 2 US Senate Committee on the Judiciary, "Confirmation Hearing on the Nomination of Brett M. Kavanaugh to Be Circuit Judge for the District of Columbia Circuit," S. Hrg. 108-878 (April 27, 2004) (Sen. Dick Durbin), <https://www.gpo.gov/fdsys/pkg/CHRG-108shrg24853/html/CHRG-108shrg24853.htm>.
- 3 Stephen Bates, "Brett Kavanaugh and the Starr Report: How Our Office Drafted the Impeachment Referral," *Lawfare*, July 13, 2018, <https://www.lawfareblog.com/brett-kavanaugh-and-starr-report-how-our-office-drafted-impeachment-referral>. The Starr Report is online at <https://www.washingtonpost.com/wp-srv/politics/special/clinton/icreport/icreport.htm?noredirect=on>.
- 4 Antonio Fins, "Brett Kavanaugh Florida ties: Elian, 2000 vote recount, Terri Schiavo," *Palm Beach Post*, July 10, 2018, <https://www.mypalmbeachpost.com/news/brett-kavanaugh-florida-ties-elian-2000-vote-recount-terri-schiavo/KW4h9QMoAZd7mogcLv7AdP/>.
- 5 US Senate Committee on the Judiciary, "Confirmation Hearing on the Nomination of Brett M. Kavanaugh," at 148.
- 6 Scott Shane et al., "Influential Judge, Loyal Friend, Conservative Warrior — and D.C. Insider," *New York Times*, July 14, 2018, <https://www.nytimes.com/2018/07/14/us/politics/judge-brett-kavanaugh.html>.
- 7 Carl Hulse and David D. Kirkpatrick, "Congress Passes and Bush Signs Legislation on Schiavo Case," *New York Times*, March 21, 2005, <https://www.nytimes.com/2005/03/21/politics/congress-passes-and-bush-signs-legislation-on-schiavo-case.html>.
- 8 Fins, "Brett Kavanaugh Florida ties."
- 9 US Senate Committee on the Judiciary, "Confirmation Hearing on the Nomination of Brett M. Kavanaugh," at 94.
- 10 Robert Novak, "No more Souters," Townhall.com, February 12, 2001, <https://townhall.com/columnists/robertnovak/2001/02/12/no-more-souters-n1145646>; Byron York, "The Nominee Who Won't Back Down," *National Review*, June 12, 2003, <https://www.nationalreview.com/2003/06/nominee-who-wont-back-down-byron-york/>; "No More Souters," *Wall Street Journal*, July 19, 2005, <https://www.wsj.com/articles/SB112173866457289093>. Debate over another nominee during this period, William Pryor (nominated in 2003), focused on a 2000 speech in which Pryor said, "I will end with my prayer for the next administration: Please, God, no more Souters." See "The Supreme Court as Guardian of Federalism, speech at "Federalism: The Quiet Revolution," US Senate Judiciary Committee, July 11, 2000, <https://web.archive.org/web/20030803105145/http://www.ago.state.al.us/speeches.cfm?Item=Single&Case=8>.
- 11 See, e.g., Chris Walker, "Over at SCOTUSblog: Kavanaugh on Administrative Law and Separation of Powers," Notice & Comment Blog, July 26, 2018, <http://yalejreg.com/nc/over-at-scotusblog-kavanaugh-on-administrative-law-and-separation-of-powers/> on Kavanaugh's record on administrative law and agencies; see also Chris Walker, "Would a Justice Kavanaugh Overturn Humphrey's Executor and Declare Independent Agencies Unconstitutional?," Notice & Comment Blog, July 27, 2018, <http://yalejreg.com/nc/would-a-justice-kavanaugh-overturn-humphreys-executor-and-declare-independent-agencies-unconstitutional/>, on whether Kavanaugh would declare independent administrative agencies unconstitutional.
- 12 *Gonzales v. Carhart*, 550 U.S. 124 (2007).
- 13 In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), <https://www.oyez.org/cases/1991/91-744>, Justice Kennedy was part of the plurality that included Justices Sandra Day O'Connor and David Souter.
- 14 *Whole Woman's Health v. Hellerstedt*, 579 U.S. ____ (2016), <https://supreme.justia.com/cases/federal/us/579/15-274/>.

- 15 Irin Carmon, "2016 Debate: On Abortion, Trump and Clinton Give Passionate Answers," NBCNews.com, October 19, 2016, <https://www.nbcnews.com/storyline/2016-presidential-debates/abortion-trump-clinton-let-it-all-hang-out-n669586>.
- 16 Sarah E. Pitlyk, "Judge Brett Kavanaugh's Impeccable Record of Constitutional Conservatism," *National Review*, July 3, 2018, <https://www.nationalreview.com/2018/07/judge-brett-kavanaughhs-impeccable-record-of-constitutional-conservatism/>.
- 17 Abortion-rights advocates also expressed concern at a comment during Kavanaugh's confirmation hearing in which he characterized a Catholic group's litigation position by saying, "they said filling out the form would make them complicit in the provision of the abortion-inducing drugs that they were, as a religious matter, objecting to." But the drugs in question were contraceptives, not abortion-inducing drugs. Religious groups have long characterized some forms of contraception as abortion, and advocates interpreted Kavanaugh's language to adopt this position. See Anna North, "Kavanaugh's description of birth control as 'abortion-inducing drugs,' explained," Vox.com, September 7, 2018, <https://www.vox.com/2018/9/7/17831508/brett-kavanaugh-confirmation-hearing-abortion-supreme-court>.
- 18 The email thread is available online at <https://int.nyt.com/data/documenthelper/269-kavanaugh-email-re-whether-roe/e6dbbda94dd204fe02af/optimized/full.pdf#page=1>.
- 19 Charlie Savage and Sheryl Gay Stolberg, "Newly Revealed Emails Raise Fresh Objections to Kavanaugh Confirmation," *New York Times*, September 6, 2018, <https://www.nytimes.com/2018/09/06/us/politics/kavanaugh-confirmation-hearings.html> ("Brett Kavanaugh's emails are rock solid evidence that he has been hiding his true beliefs and if he is given a lifetime seat on the Supreme Court, he will gut Roe v. Wade, criminalize abortion, and punish women,' NARAL Pro-Choice America, the abortion rights lobby, said in a statement.")
- 20 See Robert Barnes and Michael Kranish, "Kavanaugh advised against calling Roe v. Wade 'settled law' while a White House lawyer," *Washington Post*, September 6, 2018, https://www.washingtonpost.com/politics/courts_law/kavanaugh-advised-against-calling-roe-v-wade-settled-law-while-a-white-house-lawyer/2018/09/06/f30216dc-b1df-11e8-a20b-5f4f84429666_story.html?noredirect=on&utm_term=.1cc0d741092b.
- 21 Brett M. Kavanaugh, *From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist*, 2017 Walter Berns Constitution Day Lecture (Washington, DC: American Enterprise Institute, 2017): 6.
- 22 Ibid, 5.
- 23 Ibid, 6.
- 24 Ibid, 16.
- 25 Ibid.
- 26 See, e.g., Adam Liptak, "How Trump Chose His Supreme Court Nominee," *New York Times*, February 6, 2017, <https://www.nytimes.com/2017/02/06/us/politics/neil-gorsuch-trump-supreme-court-nominee.html> ("Mr. Trump's team is already looking down the road, weighing the choices should Justice Anthony M. Kennedy decide to step down. Judge Kethledge would be a leading candidate, an official said, and so would Judge Brett M. Kavanaugh of the Federal Appeals Court in Washington."); Joan Biskupic, "Trump's second Supreme Court pick could be the real drama," CNN.com, January 13, 2017, <https://www.cnn.com/2017/01/13/politics/trump-supreme-court-second-pick/index.html>.
- 27 Garza v. Hargan, 874 F.3d 735 (D.C. Cir. 2017) (en banc). Ultimately, because of the majority's decision, the woman was able to terminate her pregnancy. *Garza v. Hargan*, Memorandum Opinion and Order (Dist. D.C. Mar. 30, 2018).
- 28 *Garza v. Hargan*, Memorandum Opinion and Order.
- 29 Ibid., 752.
- 30 *Garza v. Hargan*, 874 F.3d, 745-52.
- 31 See Barnes and Kranish, "Kavanaugh advised against calling Roe v. Wade 'settled law' while a White House lawyer."
- 32 N.Y. Const. art. I § 6.

- 33 Hope v. Perales, 83 N.Y.2d 563, 575 (1994), <https://law.justia.com/cases/new-york/court-of-appeals/1994/83-n-y-2d-563-0.html>.
- 34 The Court of Appeal's language was, arguably, dicta, because the decision in which it appears found no violation of the right to reproductive choice. But absent a dramatic change in the composition of the New York Court of Appeals, it is difficult to imagine any new case holding that the state constitution is less protective than *Roe* and *Casey*.
- 35 Leslie Brody, "New York Gov. Cuomo Wants to Amend State Constitution to Protect Abortion Rights," *Wall Street Journal*, January 30, 2017, <https://www.wsj.com/articles/new-york-gov-cuomo-wants-to-amend-state-constitution-to-protect-abortion-rights-1485818027>.
- 36 N.Y. Const. art. XIX, sec. 1; see Gerald Benjamin, "Why is Amendment a Constitutional Question?," NYConstitution.org, accessed August 29, 2018, <http://nyconstitution.org/issue/Amendment>.
- 37 Danny Hakim, "Spitzer Pushing Bill to Shore Up Abortion Rights," *New York Times*, April 26, 2007, <https://www.nytimes.com/2007/04/26/nyregion/26spitzer.html>.
- 38 David Harris, et al., "Legal Abortion 1970-1971 — The New York City Experience," *American Journal of Public Health (AJPH)* 63, 5 (1973): 409-18, <https://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.63.5.409>, see 409.
- 39 N.Y. Penal Law §§ 125.40 (abortion in the second degree, a felony); 125.45 (abortion in the first degree, a felony); 125.50 (self-abortion in the second degree, a misdemeanor); 125.55 (self-abortion in the first degree, a misdemeanor); 125.60 ("issuing abortional articles," i.e., supplying instruments or medicine for use in abortion, a misdemeanor). The first-twenty-four-weeks and saving-life exceptions are in N.Y. Penal Law § 125.05(3).
- 40 Harris, et al., "Legal Abortion 1970-1971—The New York City Experience."
- 41 The bill, called the Negating Archaic Statutes Targeting Young Women, or NASTY Women Act, is available at <https://malegislature.gov/Bills/190/S784>.
- 42 Sarah Jones, "Blue States' Regressive Abortion Laws," *New Republic*, July 11, 2018, <https://newrepublic.com/article/149800/blue-states-regressive-abortion-laws>.
- 43 The most prominent proposal, the Reproductive Health Act, would add a health exception to the rule against late-term abortions; it would also allow more types of healthcare providers to perform abortions. The Reproductive Health Act is available at <https://www.nysenate.gov/legislation/bills/2017/S2796>.
- 44 Hakim, "Spitzer Pushing Bill to Shore Up Abortion Rights."
- 45 See the Reproductive Health Act, op. cit. On earlier bills, see Claire Landsbaum, "This Outdated New York Abortion Law Will Probably Remain in Place for Now," *TheCut.com*, June 20, 2017, <https://www.thecut.com/2017/06/new-york-wont-pass-reproductive-health-act-abortion-law.html>.
- 46 See the Reproductive Health Act, op. cit.
- 47 Roe et al. v. Wade, 410 U.S. (1973), <http://cdn.loc.gov/service/ll/usrep/usrep410/usrep410113/usrep410113.pdf>, at 163-5; Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S., at 879.
- 48 New York Attorney General, Formal Opinion No. 2016-F1 (September 7, 2016), https://ag.ny.gov/sites/default/files/abortion_opinion_2016-f1.pdf.
- 49 *Hope v. Perales*, op. cit.
- 50 *Planned Parenthood of Southeastern Pennsylvania v. Casey*, op. cit., at 877.
- 51 Erika A. Christensen, "New York Forces Women Like Me to Carry Nonviable Pregnancies to Term," *Rewire.news*, May 23, 2017, <https://rewire.news/article/2017/05/23/new-york-forces-women-like-carry-nonviable-pregnancies-term/>.
- 52 For a recent restatement of federal constitutional principles, see *Whole Woman's Health v. Hellerstedt*, op. cit. For a comparison of other states' policies on later abortions, see "State Policies on Later Abortions," Guttmacher Institute, as of September 1, 2018, <https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions>.

- 53 See, e.g., N.Y. Assembly Bill A04777 (2017), <http://nyassembly.gov/leg/?bn=A04777&term=2017>.
- 54 See N.Y. Senate Bill S2796, <https://www.nysenate.gov/legislation/bills/2017/S2796>. See also Jones, “Blue States’ Regressive Abortion Laws.”
- 55 *Mazurek v. Armstrong*, 520 U.S. 968 (1997), <https://supreme.justia.com/cases/federal/us/520/968/>.
- 56 *Armstrong v. State*, 296 Mont. 361 (1999), <https://helenaymca.org/wp-content/uploads/2012/01/Armstrong.-v.-State.pdf>.
- 57 *Whole Woman’s Health v. Hellerstedt*, op. cit.
- 58 Rebecca Harrington and Skye Gould, “The number of abortion clinics in the US has plunged in the last decade — here’s how many are in each state,” Business Insider, February 10, 2017, <https://www.businessinsider.com/how-many-abortion-clinics-are-in-america-each-state-2017-2>.
- 59 Meghan Keneally, “In growing number of states, women seeking abortions face the problem of where to go,” ABCNews.com, June 14, 2018, <https://abcnews.go.com/US/growing-number-states-women-seeking-abortions-face-problem/story?id=55632730>.
- 60 Partial-Birth Abortion Ban Act of 2003, Pub.L. 108-105, 117 Stat. 1201 (2003), codified at 18 U.S.C. § 1531, <https://www.congress.gov/108/plaws/publ105/PLAW-108publ105.pdf>.
- 61 *Stenberg v. Carhart*, 530 U.S. 914 (2000), <https://www.oyez.org/cases/1999/99-830>.
- 62 *Harris v. McRae*, 448 U.S. 297 (1980), <https://supreme.justia.com/cases/federal/us/448/297/>.
- 63 *Hope v. Perales*, op. cit. (“the fundamental right of reproductive choice does not carry with it an entitlement to sufficient public funds to exercise that right, and ... the State is not required to remove burdens, such as indigence, not of its creation”).
- 64 Ibid, 576-7.
- 65 NYS Department of Financial Services, “Governor Cuomo Announces Decisive Actions to Secure Access to Reproductive Health Services in New York,” press release, January 21, 2017, <https://www.dfs.ny.gov/about/press/pr1701211.htm>; see 11 N.Y.C.R.R. § 52.1(p), https://www.dfs.ny.gov/insurance/r_finala/2017/rf62a48txt.pdf.
- 66 *State Laws Regulating Insurance Coverage of Abortion Have Serious Consequences for Women’s Equality, Health, and Economic Stability*, Fact Sheet (Washington, DC: National Women’s Law Center, December 1, 2017), <https://nwlc.org/resources/state-bans-insurance-coverage-abortion-endanger-women%20%99s-health-and-take-health-benefits-away-women/>.



ACKNOWLEDGMENTS

I am grateful to the staff at the Rockefeller Institute of Government, particularly Jim Malatras and Katie Zuber, for assembling the panel that gave rise to this brief and for insightful comments on earlier drafts.

ABOUT THE ROCKEFELLER INSTITUTE

Created in 1981, the Rockefeller Institute of Government is a public policy think tank providing cutting-edge, evidence-based policy. Our mission is to improve the capacities of communities, state and local governments, and the federal system to work toward genuine solutions to the nation's problems. Through rigorous, objective, and accessible analysis and outreach, the Institute gives citizens and governments facts and tools relevant to public decisions.

Learn more at www.rockinst.org.



LEARN MORE

www.rockinst.org

@rockefellerinst

Rockefeller
Institute of Government